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No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 18, 2015
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 13-3067

HAWKES CO., INC.; PIERCE INVESTMENT COMPANY; LPF PROPERTIES, LLC, PLAINTIFFS-APPELLANTS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
9/19/13	Civil case docketed. [4077221] [13-3067](CYZ)
	* * * * *
12/11/14	**ARGUED & SUBMITTED in St. Paul** to Judges James B. Loken, Myron H. Bright, Jane Kelly on 12/11/2014 Mr. Reed Hopper for Appellants Hawkes Co., Inc., Pierce Investment Company and LPF Properties, LLC and Mr. Robert Lundman for Appellee United States Army Corps of Engineers. No Rebuttal. RECORDED [4224907] [13-3067] (CYZ)
4/10/15	OPINION FILED—THE COURT: James B. Loken, Myron H. Bright and Jane Kelly AUTHORING JUDGE: James B. Loken (PUBLISHED). CONCUR BY: Jane Kelly [4264064] [13-3067] (CMD)

DATE	PROCEEDINGS
4/10/15	**JUDGMENT FILED**—The judgment of the originating court is REVERSED and REMANDED in accordance with the opinion.. JAMES B. LOKEN, MYRON H. BRIGHT and JANE KELLY Hrg Dec 2014 [4264084] [13-3067] (CMD)
	* * * * *
6/9/15	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellee United States Army Corps of Engineers w/service 06/09/2015 [4283652] [13-3067] (RL)
7/7/15	JUDGE ORDER: Denying [4283652-2] petition for enbanc rehearing filed by Appellee United States Army Corps of Engineers. The petition for panel rehearing is also denied. [4283652-3] PUBLISHED ORDER. Hrg Dec 2014 [4292636] [13-3067] (MER)
7/16/15	MANDATE ISSUED. [4295880] [13-3067] (MER)
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Docket No. 0:13-cv-00107-ADM-TNL

HAWKES CO., INC. ET AL, PLAINTIFFS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/11/13	1	COMPLAINT *for Declaratory and Injunctive Relief* against Us Army Corps Of Eng. (Filing fee $ 350 receipt number 0864-3411674.) Filed by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. Filer requests summons issued. (Attachments: # 1 Exhibit(s) A-C, # 2 Civil Cover Sheet) (Merz, Gregory) (Entered: 01/11/2013)
		* * * * *
3/13/13	7	AMENDED COMPLAINT *for Declaratory and Injunctive Relief* against United States Army Corps of Engineers. Filed by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. No sum-

DATE	DOCKET NUMBER	PROCEEDINGS
		mons requested. (Attachments: # 1 Exhibits(s) A, B, C) (Merz, Gregory) (Entered: 03/13/2013)
		* * * * *
4/19/13	11	MOTION to Dismiss for Lack of Jurisdiction by United States Army Corps of Engineers. (Dertke, Daniel) (Entered: 04/19/2013)
4/19/13	12	MEMORANDUM in Support re 11 MOTION to Dismiss for Lack of Jurisdiction filed by United States Army Corps of Engineers. (Attachment: Certificate of Service). (Dertke, Daniel) Modified text on 4/19/2013 (lmb). (Entered: 04/19/2013)
		* * * * *
5/29/13	25	MEMORANDUM by Pacific Legal Foundation re 11 MOTION to Dismiss for Lack of Jurisdiction *Amicus Curiae Memorandum of Law in Support of Plaintiffs' Opposition to US Army Corps Motion to Dismiss* filed by Pacific Legal Foundation. (Attachments: # 1 LR7.1/LR72.2 Word Count Compliance Certificate) (Kaardal, Erick) (Entered: 05/29/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
5/31/13	26	MEMORANDUM in Opposition re 11 MOTION to Dismiss for Lack of Jurisdiction filed by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. (Attachments: # 1 LR7.1/LR72.2 Word Count Compliance Certificate) (Merz, Gregory) (Entered: 05/31/2013)
		* * * * *
6/21/13	28	Reply to Response to Motion re 11 MOTION to Dismiss for Lack of Jurisdiction filed by United Staets Army Corps of Engineers. (Attachments: # 1 LR7.1/LR72.2 Word Count Compliance Certificate) (Dertke, Daniel) (Entered: 06/21/2013)
		* * * * *
8/1/13	30	MEMORANDUM OPINION AND ORDER granting 11 Defendant's Motion to Dismiss for Lack of Jurisdiction (Written Opinion). Signed by Judge Ann D. Montgomery on 08/01/2013. (TLU) (Entered: 08/01/2013)
8/1/13	31	JUDGMENT (Attachments: # 1 Civil Notice—appeal) (jz) (Entered: 08/01/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
9/17/13	32	NOTICE OF APPEAL TO 8TH CIRCUIT by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. Filing fee $ 455, receipt number 0864-3699153. (Hopper, M) (Entered: 09/17/2013)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Court File No. 13-107 (ADM/THL)

HAWKES CO., INC., PIERCE INVESTMENT COMPANY, AND LPF PROPERTIES, LLC, PLAINTIFFS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT

Filed: Mar. 13, 2013

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Hawkes Co., Inc., Pierce Investment Company, and LPF Properties, LLC, for their Amended Complaint seeking declaratory and injunctive relief allege as follows:

INTRODUCTION

1. In this action, the Plaintiffs seek review pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, of a final agency action of the United States Army Corps of Engineers (the "Corps"), finding that certain property in which the Plaintiffs have an ownership or other beneficial interest (the "Property") is a water of the United States under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, known as the Clean Water Act ("CWA"), and therefore subject to the Corps' jurisdiction.

2. As a result of the Corps' unlawful assertion of jurisdiction, Plaintiffs are unable to use the Property without fear of a CWA enforcement action, fines, and penalties. The Corps' improper assertion of jurisdiction also subjects Plaintiffs to an unlawful and burdensome permitting requirement.

3. Plaintiffs seek by this action a declaration that the Property is not a water of the United States under the CWA. Plaintiffs also seek an injunction enjoining the Corps from exercising jurisdiction over Plaintiffs' Property.

4. The Court's review of the agency action that is the subject of this proceeding is based upon the administrative record before the Corps at the time the Corps made its decision.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing further "necessary or proper relief"); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

6. The Property consists of approximately 530 acres of real estate located in New Maine Township, Marshall County, Minnesota. Venue in this judicial district is proper under 28 U.S.C. § 1931(e)(2) because the Property that is the subject of the action is located within this district.

PARTIES

7. Plaintiffs Pierce Investment Company ("Pierce Investment"), a Minnesota corporation with its principal place of business in Minnesota, and LPF Properties, LLC ("LPF Properties"), a North Dakota limited liability company with its principal place of business in North Dakota, each own portions of the Property.

8. Plaintiff Hawkes Co., Inc, ("Hawkes") is a North Dakota corporation with its principal place of business in North Dakota. Hawkes will pay royalties to the owners of the Property in consideration of its use of the Property to expand Hawkes' existing nearby peat mining operations to the Property.

9. All three plaintiffs are owned by the same four or five members of the Pierce family, and Kevin Pierce is an officer of all three plaintiffs and has been acting on their behalf in these proceedings.

10. Defendant United States Army Corps of Engineers is a branch of the Department of the Army and an agency of the United States.

LEGAL BACKGROUND

11. In 1972, Congress enacted the CWA to regulate "navigable waters."

12. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of dredged and fill material into "navigable waters."

13. Section 502(7) of the CWA, *id.* § 1362(7), defines "navigable waters" to mean the "waters of the United States, including the territorial seas."

14. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, through the Corps, to issue permits for the discharge of dredged and fill material into "navigable waters."

15. By regulation, the Corps may determine whether a particular parcel of property contains "waters of the United States" by issuing an Approved Jurisdictional Determination ("JD"). 33 C.F.R. §§ 320.1(a)(6), 331.2.

16. The Corps has promulgated regulations defining "waters of the United States." *Id.* § 328.

17. Under those regulations, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered "waters of the United States." *See id.* § 328.3.

18. In 2001, the United States Supreme Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), held that isolated, intrastate, non-navigable bodies of water are not "waters of the United States."

19. In response to the *SWANCC* opinion, the Corps, along with the United States Environmental Protection Agency ("EPA"), issued an Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," seeking comment on whether and how the agencies should amend the definition of the term in order to

account for the Supreme Court's decision. 68 Fed. Reg. 1991 (Jan. 15, 2003).

20. The Corps did not follow through with the rule-making.

21. Notwithstanding *SWANCC*, the Corps and EPA continued to interpret their authority under the CWA to extend to waterbodies and wetlands so long as these features had at least a "hydrological connection" to navigable-in-fact waterbodies. *See, e.g., United States v. Rapanos*, 376 F.3d 629, 638 (6th Cir. 2004), *vacated, remanded by Rapanos v. United States*, 547 U.S. 715 (2006).

22. In *Rapanos v. United States*, the Supreme Court rejected the agencies' hydrological connection theory of CWA jurisdiction. *See* 547 U.S. at 739 (plurality opinion); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

23. In that decision, Justice Scalia authored a plurality opinion, joined by three other Justices, which concluded that the Corps' jurisdiction over non-navigable waters only extends to "relatively permanent, standing or continuously flowing bodies of water" that are "connected to traditional interstate navigable waters." *Id.* at 739, 742 (plurality opinion). In addition, wetlands adjacent to such jurisdictional waters will qualify as jurisdictional when "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742.

24. Justice Kennedy concurred in the judgment but adopted a broader interpretation of the Corps' jurisdiction over non-navigable waters, finding them

jurisdictional if they "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). According to Justice Kennedy, a significant nexus exists where non-navigable waters, either alone or in combination with similarly situated waterbodies, "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters (also known as "traditional navigable waters"). *Id.* at 780. The Eighth Circuit Court of Appeals recognizes both the plurality opinion and Justice Kennedy's significant nexus test as supporting CWA jurisdiction over wetlands. *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009).

25. After *Rapanos*, the Corps, in conjunction with EPA, issued a non-binding guidance document opining on the scope of the agencies' CWA jurisdiction. *See* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008). In that guidance document, the Corps and EPA assert their intention to exercise jurisdiction over "waters of the United States" that satisfy either the Scalia "relatively permanent" test or the Kennedy "significant nexus" test.

26. In April, 2011, the Corps and EPA issued a new draft guidance document, but it has not yet been finalized. *See* Draft Guidance on Identifying Waters Protected by the Clean Water Act (2011). In that guidance document, the Corps and EPA state their intention to continue to assert jurisdiction over "waters of the United States" that satisfy either the Scalia or the

Kennedy test. The document also notes the agencies' intention to engage in APA rulemaking after finalizing the new guidance.

FACTUAL ALLEGATIONS

The Property

27. The Property contains peat and, as such, is necessarily wetland. All peat mining occurs in wetlands because peat is only found in wetland environments. Thus peat mining is known as a "wetland dependent" activity and, in Minnesota, peat mining and wetland replacement and restoration associated with peat mining are regulated under permits issued by the Minnesota Department of Natural Resources.

28. The Plaintiffs' Property is located over 120 river miles from the nearest traditional navigable water ("TNW"), the Red River of the North.

29. There is no significant connection between Plaintiffs' Property and the Red River of the North located 120 river miles away. There is no significant chemical, physical or biological impact on, or connection between, the wetlands on Plaintiffs' Property and the Red River of the North.

30. There is no continuous surface connection between wetlands on Plaintiffs' Property and a water of the United States, such that it is difficult to determine where the water ends and the wetland begins. A farm, a separate, shallow ditch dug for farming purposes in an area the Corps concedes is upland at the border of the farm most distant from Plaintiffs' Property, and a sizable upland area are all located between Plaintiffs' Property and the area that the Corps claims

is a "relatively permanent water." In other words, the wetlands on Plaintiffs' Property are easily distinguishable from any jurisdictional water.

31. The wetlands on Plaintiffs' Property are not "waters of the United States" and in the two years that the Corps has had to establish that there is a significant nexus between the Red River of the North and Plaintiffs' Property, there is no information in the administrative record to support any such significant nexus.

Administrative Proceedings Before the Corps and Plaintiffs' Exhaustion of their Administrative Remedies

32. Hawkes is in the business of mining and processing peat. A portion of Hawkes' business involves the sale of peat meeting certain specifications to the golf course industry for use in construction of greens. In order to be suitable for the standards imposed by the industry the peat must meet certain quality standards.

33. The Property has substantial amounts of high quality peat that able to meet Hawkes's requirements for the next ten to fifteen years.

34. In October 2006, Pierce Investment obtained an option to purchase the Property, subject to receiving approval to conduct peat mining operations on the Property.

35. On March 20, 2007, Kevin Pierce, with Hawkes, met initially with representatives of the Corps and the Minnesota Department of Natural Resources ("MDNR"). The discussion at this meeting focused on potential roadblocks to the plan to mine peat on the

Property, including discussion of the Property's status as a rich fen and a wetland.

36. On January 15, 2008, Mr. Pierce again met with representatives of the Corps and the MDNR to review plans to conduct peat mining on the Property.

37. At this meeting, Mr. Pierce, on behalf of Hawkes, discussed with the Corps and MDNR representatives the high quality of the peat available at the Property and the importance to Hawkes' business of being able to mine peat on the Property. As Mr. Pierce explained, the peat then available to Hawkes provided approximately seven to ten years (as of January 2008) of future operations. Mr. Pierce also explained that, by expanding peat mining to the Property, Hawkes would extend the lifespan of its peat mining operation by ten to fifteen years.

38. On or about December 13, 2010, Hawkes applied for a permit from the Corps under Section 404 of the CWA to expand its existing peat mining operations to a portion of the Property.

39. As part of its permit application, Hawkes identified fifteen sites that it had evaluated as potential alternatives to the Property. None of those sites provided a viable alternative to peat mining on the Property.

40. In January 2011, Mr. Pierce again met with the Corps and MDNR representatives. At that meeting, Corps representatives spent the majority of time attempting to persuade Mr. Pierce to abandon his plans to mine peat on the Property. To that end, Corps representatives emphasized the cost associated with the permitting process, that there was no guarantee

that a permit would ever be granted, and that, even if a permit were to be granted, the process would take many years before it would be completed. Mr. Pierce advised that he had an option to purchase the Property and that he intended to proceed.

41. On or about March 15, 2011, the Corps issued a letter to Hawkes indicating the Corps had made a "preliminary determination that this wetland is a water of the United States and is regulated by the Corps under Section 404 of the Clean Water Act." ***See* Exhibit A.** The Corps' letter went on to assert that "at a minimum" an environmental assessment will be required.

42. Mr. Pierce again met with representatives of the Corps and the MDNR on April 23, 2011. At that meeting, one of the Corps representatives, Tamara Cameron, expressed the opinion that the Property would be completely and permanently destroyed if peat were to be mined on the Property. Ms. Cameron also stated that it could take years before a permit would be granted and that the process would be very costly.

43. On May 31 through June 3, 2011, representatives of the Corps conducted a site visit of the Property. At that time, a Hawkes employee told Steve Eggers, from the Corps, how important expanding operations to the Property was to Hawkes' ability to continue its business and how much he hoped that Hawkes would be able to begin mining on the Property soon. In response to these comments, Mr. Eggers suggested to the employee that he should start looking for another job, or words to that effect. Mr. Eggers has previously been the subject of complaints on one or

more occasions regarding his over-zealous actions on behalf of the Corps.

44. On or about August 25, 2011, the Corps sent another letter to Hawkes with a list of nine additional information items that would be needed in connection with the permit application. These included hydrological assessments of the wetland and of groundwater flow spatially and vertically, functional resource assessments including vegetation surveys, inventorying and analyzing the quality of wetlands in the entire watershed, evaluation of *upstream* potential impacts, and more. ***See* Exhibit B.** The cost of performing all of these requirements is anticipated to exceed One Hundred Thousand Dollars ($100,000.00).

45. Faced with these overly burdensome demands by the Corps and disagreeing with the Corps' preliminary determination of jurisdiction, Plaintiffs requested information on the basis for this determination.

46. On November 1, 2011, representatives of the Corps met with the then owner of the Property. Although Mr. Pierce had asked to be present in any meeting between the Corps and the landowner, the Corps chose to exclude him from this meeting. At the meeting, the Corps representatives emphasized to the landowner the harm that would result if peat mining were to be permitted on the Property and insisted that the landowner try to sell the Property to a wetlands bank or to another party. The Corps made these statements even though the Corps representatives were aware that Mr. Pierce had obtained an option to purchase the Property. The Corps also indicated that there is a very good possibility that an Environmental Impact Statement ("EIS") will be required by the

Corps for the permit application. An EIS will delay issuance of the permit for several years.

47. On November 8, 2011, the Corps provided Plaintiffs with a copy of a "draft" Jurisdictional Determination (the "draft JD") for the Property. The draft JD reflected a conclusion that the Property was connected by a Relatively Permanent Water ("RPW") —a series of culverts and unnamed streams which flowed into the Middle River—to a TNW (the Red River) and the Property was, therefore, subject to the Corps' jurisdiction under the CWA. The draft JD did not determine that there was a significant nexus between the Property and any navigable waters.

48. On December 1, 2011, Corps representatives conducted a site visit of the Property for the purpose of making a jurisdictional determination.

49. By correspondence dated December 19, 2011, Plaintiffs, through their wetland consultant, identified numerous errors in the draft JD and provided the Corps with additional information to be considered in connection with its jurisdictional determination. This information showed that there was, in fact, no RPW that connected the Property to a TNW

50. On or about February 7, 2012, Defendant issued an Approved Jurisdictional Determination (the "Initial JD"), concluding that there was a significant nexus between the Property and the Red River and accordingly, the Property was a "water of the United States" subject to the Corps' jurisdiction under the CWA.

51. On or about April 4, 2012, Plaintiffs filed a timely appeal of the JD under 33 C.F.R. § 331.6 setting

forth the reasons why the Property is not a water of the United States.

52. On or about April 23, 2012, the Regulatory Appeals Review Officer sent Plaintiffs' consultant a letter indicating that the appeal was appropriate for consideration by the administrative appeals program and the Corps then provided the administrative record to the Review Officer.

53. The parties presented their oral arguments before the Review Officer on July 24, 2012, and an Administrative Appeal Decision was issued on October 24, 2012, finding that the appeal had merit and that the administrative record "[did] not contain sufficient documentation/analysis to support a finding of Clean Water Act jurisdiction." ***See*** **Exhibit C.** In support of that conclusion, the Administrative Appeal Decision noted, among other things:

- "The [Administrative Record] does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative date [sic] given to support the finding." (footnote omitted)
- "While the [Administrative Record] provides information indicating an OHW [i.e., "ordinary high water"] mark for the unnamed tributary exists, it does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume,

duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW." (footnote omitted)

- "The [Administrative Record] included a description of the stream channel riparian corridor from the unnamed tributary to the TNW. However, the water flow regime information was not sufficient to indicate that a significant nexus exists." (footnote omitted)

54. Following remand, on or about December 31, 2012, the Corps issued a revised JD (the "Revised JD") and advised that the Revised JD is a "final Corps permit decision in accordance with 33 C.F.R. § 331.10." According to 33 C.F.R. § 331.21, Plaintiffs are considered to have exhausted their administrative remedies when a final decision is made pursuant to 33 C.F.R. § 331.10.

55. The Revised JD does not contain any new information to support a significant nexus between the Property and the Red River of the North. However, the Revised JD still purportedly relies on Justice Kennedy's "significant nexus" test to assert jurisdiction over the Property, which is described by the Revised JD as a "Non-Relatively Permanent [Water] that flow[s] directly or indirectly into [a] Traditional Navigable [Water]."

56. The Revised JD does not add any new information that would demonstrate how Plaintiffs' land, either quantitatively or qualitatively, significantly affects the physical, biological, and chemical integrity of

the Red River of the North located 120 river miles from the property. Even though the Corps has had two years to establish jurisdiction, its Revised JD, like the Initial JD, speaks only to the overall functions provided by wetlands in general and stream headwaters in general and, as the Review Officer found, it does "not speak to how the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical or biological integrity of the downstream TNW "

57. Any further efforts to obtain a permit to conduct peat mining on the Property would be futile, either because the Corps has already decided that it will not issue a permit or because the delay and expense of finally obtaining a permit would substantially impede, if not prevent, Hawkes from proceeding with its plans to mine peat on the Property.

Applicable Tests for Exercise of Jurisdiction Under the CWA

58. The controlling tests for defining "waters of the United States" are Justice Scalia's plurality opinion in *Rapanos v. United States* and Justice Kennedy's significant nexus test.

59. The Revised JD does not meet either applicable test for assertion of jurisdiction under the CWA.

60. First, the Revised JD does not meet Justice Scalia's "relatively permanent" test because there is no substantial evidence that Property contains any "relatively permanent, standing or continuously flowing bod[y] of water" that is connected to a jurisdictional water such that one cannot distinguish tell where the wetlands on Plaintiffs' Property end and the

alleged jurisdictional water begins. *Rapanos*, 547 U.S. at 739 (plurality opinion). Upland area clearly separates the two locations.

61. Second, the Revised JD does not meet Justice Kennedy's "significant nexus" test. No substantial evidence supports the Revised JD's conclusion that a significant nexus exists between the Property and the Red River of the North. The Revised JD does not establish a significant nexus because there is no new evidence in the Revised JD to determine the qualitative or quantitative effect on the Red River of the North. Such evidence is necessary to distinguish between a jurisdictional *significant* nexus and a non-jurisdictional *insignificant* nexus as indicated by the Corps' own Review Officer.

62. Since no substantial evidence exists to support the Revised JD's conclusion that a significant nexus exists between the Property and the Red River of the North, the JD impermissibly assumes, contrary to Justice Kennedy's concurring opinion in *Rapanos*, that a non-speculative effect is necessarily a *significant* effect.

Plaintiffs' Property is not subject to the CWA because it does not contain any "waters of the United States." Therefore, the Revised JD is arbitrary and capricious, contrary to law, and unsupported by substantial evidence. *See* 5 U.S.C.§ 706(2).

**FIRST CLAIM FOR RELIEF—
INJUNCTIVE RELIEF**

63. Plaintiffs hereby reallege and incorporate by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

64. Plaintiffs wish to conduct their business activities on the Property that the Corps wrongfully claims to be subject to its CWA permitting authority.

65. Plaintiffs are and will continue to be directly affected and injured by the Corps' expansive and unlawful assertion of CWA jurisdiction over their Property.

66. The Corps' Revised JD imposes significant injury on Plaintiffs by preventing them from using their Property as they wish without risking an enforcement proceeding, fines, and penalties. The Corps' Revised JD also imposes on Plaintiffs the illegal, burdensome, and expensive requirement that they obtain a Section 404 CWA permit in order to conduct their peat mining activities. As a result, Plaintiffs' use of their property has been, is being—and unless the Court grants relief —will continue to be adversely affected. Hence, the Corps' unlawful exercise of jurisdiction causes Plaintiff irreparable injury.

67. Setting aside the Corps' Revised JD will redress Plaintiffs' injuries by allowing Plaintiffs to use their property.

68. Plaintiffs have no plain, speedy, and adequate remedy at law. Absent judicial intervention, Plaintiff will continue to suffer irreparable injury.

69. The Corps' Revised JD is a final agency action subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. § 320.1(a)(6).

70. Accordingly, injunctive relief enjoining the Corps from exercising jurisdiction under the CWA is appropriate.

SECOND CLAIM FOR RELIEF—DECLARATORY JUDGMENT

71. Plaintiffs hereby reallege and incorporate by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

72. An actual and substantial controversy exists between Plaintiffs and the Corps over the Corps' failure to comply with the CWA in determining that Plaintiffs' Property contains a jurisdictional waterbody.

73. Plaintiffs contend that their Property contains no jurisdictional waterbodies, whereas the Corps, through its Revised JD, contends that it does. The Corps has had two years to develop information supporting its allegations of jurisdiction, there is a complete administrative record on which the Revised JD was made, and any further administrative proceedings before the Corps would be futile. Therefore, no further factual development is necessary to resolve the legal issues raised by this action.

74. The Corps' Revised JD is a final agency action subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. §§ 320.1(a)(6) & 331.21.

75. The case is currently justiciable because the Corps has unlawfully asserted jurisdiction over Plaintiffs' Property.

76. Plaintiffs are currently and continuously injured by the Corps' unlawful exercise of jurisdiction because the existence of the Revised JD decreases the value of their Property and prevents them from exercising their livelihood on their Property.

77. Plaintiffs are currently and continuously injured by the Corps' unlawful exercise of jurisdiction because they cannot conduct peat mining on their property without fear of an enforcement action being brought against them. The Revised JD increases the likelihood that Plaintiffs will be subject to an enforcement action should they initiate these activities. Further, the Revised JD increases Plaintiffs' potential civil and criminal liability should they initiate these activities.

78. Plaintiffs are currently and continuously injured by the Revised JD because it obligates them to go through the time consuming and expensive process of obtaining a Section 404 permit from the Corps before conducting their proposed activities, and the Corps has informed Plaintiffs in its correspondence of the substantial and expensive area wide research projects that it would require of Plaintiffs' in an effort to obtain a Section 404 permit from the Corps.

79. Plaintiffs are, therefore, entitled to a declaratory judgment declaring that the Revised JD is invalid and that the Corps does not have jurisdiction over the Property pursuant to the CWA.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment as follows:

1. A declaration that Plaintiffs' Property is not subject to the CWA;

2. A declaration that Defendant's Revised Approved Jurisdictional Determination is invalid;

3. An injunction enjoining Defendant from exercising jurisdiction over Plaintiffs' Property;

4. An award of attorney's fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses, and costs; and,

5. For any such other and further relief that the Court deems proper under the circumstances of this case.

DATED: Mar. 13, 2013.

Respectfully submitted,

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

By /s/ GREGORY R. MERZ

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[SEAL OMITTED]

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL MINNESOTA 55101-1678

Mar. 15, 2011

REPLY TO
ATTENTION OF

Operations
Regulatory (2007-01914-LSP)

Kevin Pierce, Vice President
Hawkes Peat Company, Inc.
P.O. Box 14111
Grand Forks, North Dakota 58208

Dear Mr. Pierce;

The St. Paul District, Corps of Engineers (Corps) is in receipt of a permit application from Hawkes Peat Company regarding a proposal to expand a peat mining operation at the company's Mercil Site. The project is located in the SW ¼, and S ½, and the NW ¼, Sec. 13, T. 157N., R.44W Marshall County, Minnesota.

The proposed project will involve the expansion of the current peat mining operation near Newfolden, Minnesota by approximately 150 acres. The project will involve the construction of drainage ditches, removal and stockpiling of topsoil overburden, mining of peat over an approximately 20 year time frame and restoration of the site at the cessation of the mining operation.

The Corps has made a preliminary determination that this wetland is a water of the United States and is regulated by the Corps under Section 404 of the Clean Water Act. The activity as proposed would require Department of the Army authorization under Section 404.

The Corps' evaluation of a Section 404 permit application involves multiple analyses, including (1) evaluating the proposal's impacts in accordance with the National Environmental Policy Act (NEPA) (33 CFR part 325), (2) determining whether the proposal is contrary to the public interest (33 CFR § 320.4), (3) determining whether the proposal complies with the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230). Information about the Corps permitting process can be obtained online at http://www.mvp/usace. army.mil/regulatory.

The processing of a standard individual permit for the proposed peat mine will, at a minimum, require an environmental assessment (EA) to satisfy the requirements of NEPA. An EA is used to determine whether an Environmental Impact Statement (EIS) must be prepared to disclose and evaluate the impacts of your proposal. There are two possible outcomes from an EA: a finding of no significant impact (FONSI) or a determination that an EIS will be required. Due to the nature of the proposed site (rich fen), the Corps would like to meet with you to discuss the federal requirements for preparation of environmental documents.

It is our understanding that this project exceeds the state threshold for a mandatory Environmental As-

sessment Worksheet (EAW) and may require the preparation of a state EIS. Therefore, to allow for timely joint review by both state and federal agencies, we recommend that your environmental document address the requirements of both state and federal programs.

We would like to meet with you at your earliest convenience, so that we may discuss with you the information we will need to review your proposal and reach a permit decision. We would also like to coordinate with the State of Minnesota so that both agencies could be represented at the meeting.

Because the proposal involves several state and federal agencies located in St. Paul, this may be the most efficient location for a meeting. If you need additional information or would like to discuss this project further, please contact Larry Puchalski at 218-444-6381, the Corps' project manager for the County in which this proposal is located.

Sincerely,

/s/ [ILLEGIBLE]

for Tamara E. Cameron
Chief, Regulatory Branch

Cf:
Kurt Johnson, NRRI
Steve Hofstad, BWSR
Danny Thorstad, Marshall County SWCD
Garry Bennett, MnDNR Waters, Thief River Falls
Julie Jordan, MnDNR Lands and Minerals, Hibbing
Nathan Kestner, MnDNR Region 1 Environmental Review, Bemidji
Steve Colvin, Unit Director, MnDNR Environmental Review
Randall Doneen, MnDNR Environmental Review Operations Lead, St. Paul
Jennifer Engstrom, MnDNR Mineland Reclamation Manager, St. Paul
Jill Clancy, Corps of Engineers, St. Paul
Steve Eggers, Corps of Engineers, St. Paul

[SEAL OMITTED]

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL MINNESOTA 55101-1678

REPLY TO
ATTENTION OF

Operations
Regulatory (2007-01914-DJS)

Aug. 25, 2011

Mr. Kevin Pierce
Hawkes Peat Company Inc.
P.O. Box 14111
Grand Forks, North Dakota

Dear Mr. Pierce:

This letter is in regard to the permit application you submitted on behalf of Hawkes Peat Company Inc., for your proposed peat mining expansion proposal at the Mercil Property Site. The project location is in Section 13, T. 157N., R. 44W., Marshall County, Minnesota.

In order for the Corps to issue a Public Notice (PN) for your proposed project, our regulations require that specific information be submitted for it to be a **complete application.** Items generally necessary for a complete application are listed in 33CFR 325.1. A public notice is the primary method by which the Corps advises interested parties and commenting agencies of the proposed activity. The notice must include information sufficient to explain the nature of the activity and the probable impact on the public

interest. Depending on the scale and magnitude of the proposed project, information sufficient to generate meaningful comment may vary with each proposal. Based on the proposal and comments received, additional resources assessments/studies or analyses evaluating the site or nature of the activity and magnitude of the impacts/effects, individually and cumulatively, may be required during the permit review process.

One specific area of information that is required includes the amount of wetland/waters of the U.S. impacted by filling or dredging and the proposed compensatory mitigation for those impacts. Based on the results of our site visit on June 1, 2011, the wetland determination and general wetland impact assessment you submitted in your application is not sufficient to depict the actual extent, location and type of wetlands at the site and thus, determine the impacts that may result from your proposed project.

During our site visit, we observed additional wetland areas on the parcel that were not included in your wetland determination. The determination submitted in your application utilized the National Wetland Inventory (NWI). The NWI has limited accuracy in several parts of northern Minnesota. Therefore, a wetland delineation completed in accordance with the 1987 Corps of Engineers Wetland Delineation Manual and appropriate Regional Supplement (Great Plains Region) is required.

An understanding of the amount, type and location of wetlands on the project site and an accurate impact assessment is fundamental to our review. Based on the results of the delineation, the overall impacts to

aquatic resources may be greater than the 150 acres identified in your application. The areas of proposed roads, sedimentation basins, drainage ditches and stock piles must also be evaluated for the presence of wetlands. The impact assessment should include the amount of types of wetland impacts of the project including all direct impacts, temporary and permanent (e.g., direct fill and excavation); and all indirect temporary and permanent impacts (e.g., lateral effect as a result of ditching and wetland conversion). Upon receipt of this information, we should be able to issue a public notice of your permit application, in accordance with our regulations, inviting public and resource agency comment on your proposal, which would include the U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service.

The following additional information is needed to facilitate our analysis of the potential effects of your proposed project:

1. The depth of peat across the site; the proposed depth of mining and the peat reserves proposed to be left in place at the end of the operation;

2. A hydrogeologic assessment of the rich fen system including the mineral/nutrient composition and pH of the groundwater; groundwater flow spatially and vertically; discharge and recharges areas;

3. A functional/resource assessment of the site including a vegetation survey and identification of native fen plant communities across the site; and

4. An inventory of similar wetlands in the general area(watershed), including some analysis of their quality—to provide some assessment of the extent of the loss of the specified amount and quality of rich fen community relative to the overall amount and quality of that resource in the area (watershed).

5. An inventory of rich fen plant communities that are within sites of High and Outstanding Biodiversity Significance in the area (watershed).

6. Information on potential impacts to unmined upstream portions of this rich fen (i.e. state land to the west) through disruption of groundwater flow, lowering of the water tables, and changes in surface runoff.

7. Details of the proposed road construction and removal and/or mitigation upon closure of the operation.

8. Information on the planned site reclamation as described in your application related to the amount of peat that will be removed from the site due to mining and the anticipated wetland community that will result. Please discuss how this wetland community would replace the functions lost from the existing fen ecosystem.

9. To facilitate our review of your mitigation proposal, please provide us with any examples of successful restorations to a fen community with a similar level of quality.

As discussed with you in March 2011, in order for the Corps to reach a permit decision, the Corps must complete multiple analyses which includes evaluating

the probable impacts of the project in accordance with the National Environmental Policy Act; demonstrating compliance with the Section 404(b)(1) guidelines (alternatives, avoidance and minimization, compensatory mitigation); evaluating the impacts of the activity on the public interest; and demonstrating compliance with other applicable laws, such as the National Historic Preservation Act and the Endangered Species Act.

The Corps would like to meet with you and your agent or consultant to further discuss your alternatives analysis, proposed mitigation and the level of analysis required to comply with the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act (CWA). We also recommend coordinating this meeting with the State of Minnesota, so that both federal and state agencies can be represented at the meeting. Please contact Mr. Dan Seemon in our St. Paul office at (651) 290-5380. In any correspondence or inquiries, please refer to the Regulatory number shown above.

Sincerely,

/s/ [ILLEGIBLE]
for Tamara E. Cameron
Chief, Regulatory Branch

Copy furnished:
Kurt Johnson, NRRI
Danny Thorstad, Marshall County SWCD
Garry Bennett, MnDNR Waters, Thief River Falls
Julie Jordan, MnDNR Lands and Minerals, Hibbing
Nathan Kestner, MnDNR Region 1 Environmental Review, Bemidji
Steve Colvin, Unit Director, MnDNR Environmental Review
Randall Doneen, MnDNR Environmental 1 Review Operations Lead, St. Paul
Jennifer Engstrom, MnDNR Mineland Reclamation Manager, St. Paul
Steve Eggers, Corps of Engineers, St. Paul

ADMINISTRATIVE APPEAL DECISION
HAWKES PEAT COMPANY, INC.
JURISDICTIONAL DETERMINATION
FILE NO. MVP 2007-01914-DJS,
ST. PAUL DISTRICT
Oct. 24, 2012

Review Officer(s): Mr. Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division (Lead)

Ms. Tonya Acuff. U.S. Army Corps of Engineers, Mississippi Valley Division

Appellant/Applicant: Mr. Kevin Pierce, Marshall County, Minnesota

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: 6 April 2012

Date of Acceptance of Request for Appeal: 23 April 2012

Approved JD Appeal Conference Call: 24 July 2012

Summary of Appeal Decision: I find that one of Mr. Pierce's reasons for appeal have merit. There is insufficient documentation in the record to support the finding that the wetland on Mr. Pierce's property, along with other similarly situated wetlands adjacent to the tributary, has a significant (more than insubstantial or speculative) effect on the chemical, physical, and biological integrity of the Red River of the North. The administrative record does not support the District's determination that a significant nexus exists between the subject property wetlands and the traditional navigable water, Red River of the North. The

remaining reasons for appeal have been determined not to have merit.

Background Information:

Mr. Pierce (appellant) is challenging the assertion by St. Paul District, MVP (the "District"), that the U.S. Army Corps of Engineers has jurisdiction over his property. In particular, he alleges that a significant nexus does not exist between the 155 acres of wetlands on his property and the Red River of the North, a navigable water of the United States. The property (known as the Mercil Site) is located in Section 13, Township 157 North, Range 44 West, near Newfolden, Marshall County, Minnesota.

The District contends that the onsite wetlands are adjacent to a non-Relatively Permanent Water (RPW) that flows directly or indirectly into a traditional navigable waterway (TNW) which is the Red River of the North.

The District claims jurisdiction over the wetlands via significant nexus to the downstream TNW.

Mr. Pierce's consultant, Mr. Brian Ross with Widseth, Smith, Nolting & Associates (WSN), provided information in December 2010 to the St. Paul District to establish the lack of Corps jurisdiction of the site's wetlands based on the no hydrologic connectivity to a navigable water of the U.S. There is no question that the site contains wetlands: the appellant is arguing that the wetlands are isolated and therefore, not regulated. The approved jurisdictional determination (AJD) sent to the appellant on 7 February 2012, did not identify the limits of Corps jurisdiction on the site.

The consultant stated that if the site is determined to be jurisdictional, they would furnish a wetland delineation for Corps review at a later date.

Information Received During the Appeal and its Disposition:

1. The District provided a copy of the administrative record (AR), which was reviewed and considered in this request for appeal. The AR was provided on 3 May 2012.

2. The appellant's agent provided clarifying information at the time of the submittal of the RFA.

3. The District provided additional clarifying information via email dated 17 September 2012, regarding procedures used to calculate the drainage basin size at the request of the RO.

Evaluation of the Reason for Appeal/Appeal Decision Findings:

APPEAL REASON #1: There is no basis for jurisdiction because the expansion area wetland[1] is not adjacent to the ditch or the non-Relatively Permanent Water.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states in the RFA that "The Corps must show a substantial nexus to the Red River of the North. In order to do so, the Corps must

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[1] This refers to the project area which is a 155-acre expansion of the ongoing peat mining operation.

first connect the river to the expansion area wetland by showing that the expansion area wetland is 'adjacent' to a jurisdictional water" It further states that "there is no wetland adjacent to a 'tributary' or other jurisdictional water here that would allow for the assertion of jurisdiction." Additionally, if the expansion area wetland is to be jurisdictional, it must mean that a jurisdictional water is 'neighboring' the expansion area"

The District staff (William Baer and Craig Jarnot) made a site visit on 1 December, 2011[2] to the property of Mr. Jon Hirst who owns the property southeast of the expansion area. The District observed a non-jurisdictional, man-made ditch located along the northern border of the property (and adjacent to the larger wetland complex). Water flow is described as traveling through the excavated ditch and through the pasture/hayfield. The water then flows into a natural, meandering channel to the Middle River. The District notes that there were ordinary high water (OHW) indicators within the natural channel reach. The indicators were natural lines impressed upon the bank, shelving, changes in the character of the soil, sediment sorting, leaf litter disturbed or washed away, scour, deposition, bed and banks, and changes in the plant community. The rationale for the District's findings that the natural channel contained a definable OHW indicator in accordance with Regulatory Guidance letter (RGL) 05-05[3] is supported in the AR. Accord-

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[2] AR page COE000068

[3] Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark (OHWM), 7 December 2005

ing to the AR, OHW indicators were found in the man-made ditch (matted down, bent, or absent vegetation within the majority of the ditch). However, the AR also noted that it was difficult to tell if this was due to water movement, or wildlife grazing/travel activity.

The expansion area wetland is part of a contiguous, approximately 591-acre complex of wetlands within the Snake River drainage area, HUC 0902309, as demarcated by the United States Geological Service (USGS). The District is asserting jurisdiction over the expansion area via adjacency to non-RPW located along the southern border of the wetland complex. In the Section II.B.1.(a) of the JD form, the District identifies the wetlands as being "adjacent to non-RPWs that flow directly or indirectly into TNWs"

For CWA purposes, the term "adjacent" means bordering, contiguous, or neighboring as stated in 33 C.F.R. 328.3(c). Revised Rapanos guidance, released on December 2, 2008[4], further addresses the definition of adjacency, stating that:

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[4] On June 5, 2007, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (Agencies) issued joint agency guidance regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States ("Rapanos"). In response to comments received, the agencies provided revised guidance on December 2, 2008 (Revised Guidance), which remains the most current and in effect. It may be referenced at: http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx, or http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

> [T]he agencies consider wetlands adjacent if one of the following three criteria are satisfied. First, there is unbroken surface or shallow sub-surface connection to jurisdictional waters. Second, they are physically separated from jurisdictional waters by man-made barriers, natural rivers berms, beach dunes and the like, Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

The District determined that the project area is part of a larger complex, of which, a portion is adjacent to a drainage ditch and flows ultimately to the Red River of the North. The District indicated current drainage on the site flowed through the man-made ditch, through the natural stream channel, to the Middle River, and then to the Red River of the North, a TNW[5] While the man-made ditch along the southern border of the wetland is not jurisdictional, it provides a discrete hydrologic connection from the wetland to the Red River. Using a non-jurisdictional ditch to establish adjacency to a TNW is supported by the Revised 2008 Guidance[4], which states:

> "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.

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[5] Support for flow rationale is found in AR Pgs COE000020-22 [Figs 2, 3, and 4]; AR pg COE000142 [site visit]

Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water."

This reason for appeal does not have merit because the District supported in the AR the rationale, in accordance with applicable law, regulation, and policy, for stating that the expansion area wetlands are adjacent to the man-made ditch and non-RPW.

APPEAL REASON #2: The Corps mapped the incorrect drainage area for the expansion.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states in the RFA that "The Corps has incorrectly mapped the drainage area to overestimate the relevant reach and overstate its claim of any nexus to the Red River of the North. Figure 4 of the JD shows a much more inclusive drainage area for the ravine than actually exists." The appellant states that "furthermore, our analysis of the light detection and ranging (LiDAR) data shows a drainage divide at the north of the main expansion area wetland basin. The LiDAR data shows a northwest to southwest trending trough highlighted by the 1140 contours just north of the drainage divide. North of the drainage divide, there are surface water channels within the wetlands that carry the water to the southeast." The appellant states in the RFA that the drainage area is 551 acres, which is less than the 1

square mile needed to meet the District's definition of tributary "seasonal flow"

In Section III.B.1.i of the JD Form[6], the District identified the drainage area as 2.4 square miles (or 1536 acres) and located within Hydrologic Unit Code (HUC) 09020309, as noted on AR COE000005.

The Corps mapped the drainage area using various hydrology database tools within ArcToolbox and also LiDAR data available[7]

This reason does not have merit because the District supported in the AR the rationale and methods used in determining the drainage basin for the project area. The District used best available information in the determination of the project area's drainage basin. While the appellant stated the drainage area is incorrect, the District supported their methods of using LiDAR and associated program tools to calculate the drainage area.

APPEAL REASON #3: The "relevant reach" is not a tributary or other jurisdictional water.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

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[6] AR page COE000006

[7] Per a clarifying email to the Review Officer dated 17 September 2012, Tim Smith, Regulatory project manager, described the drainage basin mapping techniques used by the Corps in determining the project drainage area.

DISCUSSION: The appellant states in the RFA that "the Corps identifies a 'tributary'[8] of the Middle River that is allegedly part of a relevant reach, but nothing in that location meets the definition of a tributary. Rather, a grassed swale leads to an erosional ravine that incises the upland plain area."

According to the Guidebook[9], "A tributary, as defined here, is a natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW"

Both the Guidebook and the Revised 2008 Guidance state that "A tributary is the entire reach of the stream that is of the same order (ie, from the point of confluence, where two lower order streams meet to form the tributary, downtream to the point such tributary enters a higher order stream.)"

The AR identified the relevant reach on a map labeled Figure 4[10] The map depicts jurisdiction being asserted through the 1,518 linear-foot natural, unnamed tributary which flows into the Middle River. The Middle River ultimately flows into the Red River of the North (TNW). The relevant reach is described in

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[8] AR page COE000022

[9] The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* is used as the U.S. Army Corps of Engineers Regulatory Program Standard Operating Procedures for conducting an approved jurisdictional determination evaluation and the documenting practices to support an approved jurisdictional determination. 2007 version, Page 40.

[10] AR page COE000022

the AR[11] as the confluence of two first order streams which enter the Middle River (a second order stream).

In Section III.B.1.(ii)(c) of the JD form, the District documented the natural tributary used for establishing relevant reach as having both a bed and bank, and OHW indicators which included the features of clear, natural impressed lines on the bank, changes in the character of soil, shelving, leaf litter disturbed or washed away, sediment sorting, and abrupt change in plant community.

This reason for appeal does not have merit because the District supported in the AR the rationale for the identification of the relevant reach used for jurisdiction in accordance with the Regulations.

APPEAL REASON #4: In the RFA, the appellant alleges that a significant nexus does not exist between the expansion area wetland and the Red River of the North. The following are several specific reasons for appeal relating to the District's determination:

APPEAL REASON 4(a): There is no significant chemical connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the chemical integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall

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[11] AR page COE000016

document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands. Specifically, the District will document the volume, duration, and frequency of water flow from the wetlands to the TNW.

DISCUSSION: The appellant stated in the RFA that "the District provides no measureable or quantitative data on how the expansion area wetlands would affect the Red River of the North. The Corps only talks in generalities about the functions of headwater streams and their importance for nutrient transformation"

In the AR[12], the District described the stream chemical properties as follows:

> "[S]urface flows were not observed in the tributary by the Corps staff. The contributing area to the tributary is predominantly comprised of open space with limited agricultural usage (row crops and hay) and residential dwellings. Water quality has not been formally assessed by the MPCA but is expected to be good based on adjacent land uses, amounts of wetlands in the area, and buffers from the tributary."

The District states in the additional significant nexus information[13] that "there is no water quality data for the unnamed tributary. However, general inferences about potential pollutants can be made by evaluating the land use within, and upstream of, the drainage area of the relevant reach. The contributing area to the tributary is predominantly comprised of open spaces

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[12] AR page COE000008

[13] AR page COE000016

with limited agricultural usage (row crops and hay) and residential dwellings. In general, areas with limited impervious and agricultural use have a better water quality and are less likely to have water quality impairment. As a result, the discharges from the relevant reach would be viewed as having a beneficial effect on the downstream TNW."

The 2008 Guidance states " agencies will consider other relevant factors, including the functions performed by the tributary together with the wetlands, and any adjacent wetlands, which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream food webs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream) "

The AR does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states[14] that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative date given to support the finding.

The District's use of the word "suggest", and "reasonable to conclude" in their descriptions of ground water influence on tributary flow implies speculation. There were no specific facts documented that could verify these assertions.

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[14] AR page COE000016

APPEAL REASON 4(b): There is no significant physical connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the physical integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall document the hydrologic functions performed by the tributary and all of its adjacent wetlands. Specifically, the District will document the number of flow events per year, volume, duration, and frequency of flow events from the wetlands to the TNW.

DISCUSSION: The appellant stated in the RFA that "the physical connection between the expansion area wetland, and any wetlands in the relevant reach to the Red River of the North, is insignificant because the drainage area is small and outflow is limited by the basin orientation." The RFA further states that there is little to no runoff of water from the wetlands to the TNW, therefore there is no significant physical connection of runoff reaching the river.

The District identified a 155-acre forested wetland on the appellant's property, and determined that this wetland area is part of a larger wetland complex that is adjacent to an unnamed, non-RPW tributary. Per the

Rapanos guidance, a wetland adjacent to a non-RPW requires a significant nexus evaluation[15]

The 155-acre wetland in question is located within a larger 550-acre wetland complex. The complex wetlands are adjacent to a 448 linear-foot, non-jurisdictional drainage feature that flows approximately 512 feet into an unnamed tributary of the Middle River for 1518 linear feet, into the Middle River which then flows into the Red River of the North. Ultimately, the water flows through two tributaries, and 30 or more miles, before entering the TNW.

The AR included documentation regarding precipitation amounts, snowfall amounts, watershed size, drainage area, and estimated acre-feet of water storage within the wetlands[16], but did not contain any estimated flow events per year. The unnamed tributary was determined by the District to have a bed and bank and an OHW indicator in accordance with RGL 05-05[3]

In regards to the "physical" nexus with the downstream TNW, the District described stream surface flow as follows:

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[15] In his concurring opinion in *Rapanos*, Justice Kennedy concluded that wetlands are waters of the United States "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable'" According to the *Rapanos* guidance, similarly situated wetlands include all wetlands adjacent to the same tributary, thus in this case, all wetlands adjacent to the man-made ditch must be included in the significant nexus evaluation.

[16] AR page COE000023

> "The District was only able to observe the tributary once on December 1, 2011. At that time, there was no surface flow in the channel but pools were observed sporadically throughout its length. These observations were made at a severe drought in this portion of Minnesota and suggest that there is a groundwater component to the flow in the channel. To further evaluate flow in the tributary the District utilized its seasonal stream evaluation protocol. In general, tributaries that have drainage areas in excess of one square mile typically meet the agency's definition of seasonal flow (continuous flow for at least three months). The drainage area for the unnamed tributary was determined to be 2.4 square miles or almost 2.5 times the threshold identified during the District's assessment of flow duration on first and second order tributaries. Given this information, it is reasonable to conclude that the tributary has seasonal flow between ice out and mid-June. Flow may persist longer in years with normal precipitation of groundwater discharge is supplying flow to the tributary. However, additional site investigations would be required to confirm this contribution"

Additional tributary flow information was provided in the supplemental significant nexus attachment[17] provided in the AJD. The District stated that:

> "Flow in the unnamed tributary has not been qualitatively assessed and the only direct observations of the channel were made in December of 2011 at which time there was standing water in pools but no

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[17] AR page COE000016.

> continuous flow. In northern Minnesota, it is expected that for this type of stream channel, velocity would typically be highest in the spring (March and April) in response to snowmelt and precipitation. Stream flow would steadily decline through late April and May and would be expected to completely dissipate by sometime in June or July when evapotranspiration rates are highest. Flow may be observed periodically outside of this time frame in response to precipitation events."

The 2008 Revised Guidance states that "Principle considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour."

While the AR[18] provides information indicating an OHW mark for the unnamed tributary exists, it does

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[18] AR page COE000068

not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW. The District stated that flow was present during the site visit; however, the District could not definitively identify any type of flow present in the channel by either precipitation runoff or by groundwater flow. Additionally, the District stated that additional site investigations would be needed to determine the site's hydrologic connectivity.

APPEAL REASON 4(c): There is no significant biological connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide additional documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the biological integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.

DISCUSSION: The appellant states in the RFA that "the ravine and the expansion area wetland provide no fish habitat to support a biological connection. The ravine is without flowing water during a vast majority of the year, and in some years there is no flow in the ravine at all. Furthermore, the Middle River biome, a bottomland forest, is different from the Mercile wetland (expansion area), a rich fen, and so they are not

connected biologically or ecologically, and they are separated by a twenty-foot vertical gradient."

The AR[19] included a description of the stream channel riparian corridor from the unnamed tributary to the TNW. However, the water flow regime information was not sufficient to indicate that a significant nexus exists. As indicated in Reason 4(b), field assessments did not provide evidence of water flow.

The 2008 Guidance states " habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping."

The District also did not indicate if the expansion area wetland supports any aquatic/wildlife diversity. The AR[20] mentioned aquatic species that the Red River of the North supports, but no mention of species being located within the tributary or wetland. Additional information is needed to indicate if the wetland provides any significant biological/ecological contribution to the TNW.

CONCLUSION:

In discussing the significant nexus in the Rapanos memo, Justice Kennedy stated: "The required nexus must be assessed in terms of the status's goals and purposes. Congress enacted the Clean Water Act (CWA) to 'restore and maintain the chemical, physi-

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[19] AR page COE000008

[20] AR page COE000018

cal, and/or biological integrity of the Nation's waters " Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters. While the District does not need to clearly support all three attributes, they do need to clearly support that the onsite wetlands and tributary provide more than a speculative or insubstantial effect on the physical, chemical, or biological integrity of the Red River of the North. The decision is being remanded to document whether a significant nexus does indeed exist between the onsite wetlands and tributary and the Red River of the North for any of the attributes.

Based on the information contained in Reason #4 (a), (b), and (c), the AR does not provide sufficient documentation to establish a significant nexus between the expansion area wetlands and the Red River of the North based on the information provided.

The District speaks to the overall functions provided by stream headwaters, the similarly situated wetlands, and wetlands in general, within the review area. However, they do not speak to how the functions that the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical, or biological integrity of the downstream TNW

For the reasons stated above, I find that the appeal has merit since the District's AR does not support its determination that the subject property contains jurisdictional wetlands and waters. I am remanding the AJD back to the District for reconsideration in light of

this decision. The District shall complete these tasks within 60 days from the date of this decision and upon completion, provide the Division office and appellant with its decision document and final AJD.

/s/ [ILLEGIBLE]
for John W. Peabody
Major General, U.S. Army
Commanding